Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HERBERT P. RUSSELL,

Petitioner,

v.

CAPITAL ONE BANK,

Defendant.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the District Court correctly held, and the Sixth Circuit Court of Appeals properly affirmed, that there was no genuine issue as to any material fact and as a matter of law Respondent was entitled to judgment by the terms of its contract with Petitioner.

II. Whether, upon the District Court's granting of summary judgment and the Sixth Circuit Court of Appeal's conclusion that summary judgment was appropriate as a matter of law, the Petitioner may now complain for the first time that he was deprived of counsel in a civil case involving Petitioner's credit card debt.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Capital One Bank is a subsidiary of Capital One Financial Corporation, a publicly traded company.

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BRIEF IN OPPOSITION

Respondent respectfully submits that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit should be denied.

OPINIONS BELOW

Herbert P. Russell v. Capital One Bank, Case No. 99-3951, United States Court of Appeals for the Sixth Circuit, reported at 2000 WL 875697 (June 19, 2000) (unpublished decision) (Petitioner's Appendix A); *Herbert P. Russell v. Capital One Bank*, 98CV2777 (N.D. Ohio, June 30, 1999) (Petitioner's Appendix B).

AMENDMENT V OF THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a *pro se* case in which the District Court's grant of summary judgment to Capital One on Petitioner's credit card debt in the amount of $15,443.54 was affirmed by the Court of Appeals for the Sixth Circuit. None of the material facts of the case were disputed by Petitioner, Herbert P. Russell ("Mr. Russell"). He incurred the charges on his credit card and acknowledged the validity of the debt. At no time during the proceedings before the District Court did Mr. Russell request that counsel be appointed to assist him nor did he request a continuance to seek the assistance of counsel. Now Mr. Russell alleges for the first time that the District Court violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution when it did not appoint counsel to represent him in a civil case. He further asserts that the District Court abused its discretion in denying his Motion for Reconsideration of its well-reasoned decision granting Capital One summary judgment, and denying Mr. Russell partial summary judgment.

In 1995, Mr. Russell entered into an agreement (the "Customer Agreement") with Capital One Bank ("Capital One") for a credit card account that incorporated a provision expressly permitting Capital One to make changes in the terms of the agreement upon proper notice. *See* Petitioner's Appendix B at B5.

Mr. Russell breached the terms of his Customer Agreement by failing to make proper and timely payments on his credit card debt when Capital One raised the minimum monthly payment from 2% of the balance to 3% of the balance. The District Court found that Mr. Russell's account with Capital One was "controlled by the Customer Agreement which applied to [Mr. Russell] . . . . Although the offer stated that the minimum payment would be 2%, the terms of the existing Customer Agreement provided for a change in minimum monthly payments." *See* Petitioner's Appendix B at B13.

The District Court found that Capital One acted in compliance with the terms of the Customer Agreement. Capital One notified Mr. Russell prior to implementing the change in his minimum monthly payments, and again after the changes went into effect. In the subsequent communication, Capital One sent a written explanation of the Customer Agreement and the changes being implemented, and referenced the earlier notice Mr. Russell received. *See* Petitioner's Appendix B at B6.

Mr. Russell breached the Customer Agreement when he refused to make the required minimum payments, resulting in a seriously delinquent account with Capital One. The District Court accurately stated: "The Customer Agreement requires [Mr. Russell] to pay at least the minimum amount shown on the statement. Consequently, [he] is in breach of his contract with Capital One Bank." *See* Petitioner's Appendix B at B14.

On November 30, 1998, Mr. Russell filed suit against Capital One, alleging violations of the Fair Credit Billing Act

("FCBA"), the Fair Debt Collection Practices Act ("FDCPA"), Equal Credit Opportunity Act ("ECOA"), and stated claims of breach of contract and intentional infliction of emotional distress. As the Sixth Circuit Court of Appeals noted, Mr. Russell never disputed the amount owed of his credit card debt. *See* Petitioner's Appendix A at A3. Mr. Russell argues that Capital One was bound to a 2% rate for minimum monthly payments, an assertion that contradicts the terms of the contract governing his relationship with Capital One. *See* Petitioner's Appendix A at A3. On January 21, 1999, Capital One filed a counterclaim seeking payment of the amount Mr. Russell owed Capital One in debt.

In the course of the proceedings before the District Court, the Court carefully complied with all procedural requirements of due process. The Court held several case management conferences, allowed both parties to express views on the issues and discovery matters (verbally and in writing), considered and ruled on each and every one of the voluminous motions filed by Mr. Russell, and timely produced well-reasoned opinions on all of the issues before it. *See, e.g.*, Petitioner's Appendix B.

Mr. Russell never requested counsel, nor did he request a continuance to seek legal counsel. Furthermore, Mr. Russell admits in his petition for writ of certiorari that he has no due process right to court-appointed counsel. *See* Petitioner's Petition at 6.

On appeal to the Sixth Circuit Court of Appeals, Mr. Russell raised only the breach of contract claim. Consequently, the Circuit Court addressed only the breach of contract claim and determined that he had abandoned the other claims. *See* Petitioner's Appendix A at A2. Neither the District Court nor the Circuit Court of Appeals were presented with an assertion by Mr. Russell that he had a right to legal counsel or that the Court had otherwise deprived him of his rights.

The District Court and the Sixth Circuit Court of Appeals correctly determined that Mr. Russell's claims to avoid paying his credit card debt in the amount of $15,443.54 were without merit. *See* Petitioner's Appendix A and Petitioner's Appendix B. Based upon an application of law to the undisputed relevant facts, the District Court properly granted summary judgment for the defendant, Capital One (pursuant to Fed. R. Civ. P. 56), for the undisputed amount owed by Mr. Russell to Capital One.

II. COURSE OF PROCEEDINGS

On November 30, 1998, Mr. Russell filed a complaint against Capital One in the District Court alleging violations of federal statutes governing billing and debt collection, and raised state law claims of breach of contract and intentional infliction of emotional distress.

On December 3, 1998, Capital One was served with a summons and complaint.

On December 16, 1998, Capital One filed a motion for an extension of time to respond to the complaint, which was granted on December 17, 1998. Also on this date, the District Court set a case management conference for January 21, 1999.

On December 21, 1998, Mr. Russell filed a response opposing Capital One's Motion for an Extension of Time.

On January 11, 1999, Mr. Russell filed a Motion for Partial Summary Judgment.

On January 21, 1999, the District Court held a case management conference, and Capital One filed an answer and counterclaim.

On January 29, 1999, Mr. Russell filed a Motion for an Extension of Time to Answer the Counterclaim, which the District Court granted on February 11, 1999.

On February 2, 1999, the District Court issued an order for a case management conference to be held on February 10, 1999.

On February 5, 1999, Mr. Russell filed a Request for Production of Documents.

On February 9, 1999, Mr. Russell filed a Motion for Leave to file an Amended Complaint and a Motion to File an Amended Complaint. The issue was fully briefed by both parties. On February 10, 1999, Mr. Russell filed Plaintiff's Report of the Parties Planning Meeting, and also filed his reply to the counterclaim.

On March 23, 1999, Mr. Russell filed a Motion for a Mandatory Preliminary Injunction. Capital One requested an extension of time to respond to this Motion, which the Court granted after considering Mr. Russell's Motion in Opposition. On May 17, 1999, Capital One filed a Memorandum in Opposition to Mr. Russell's Petition for a Mandatory Preliminary Injunction. Mr. Russell filed several Memoranda in support of his Petition—one on May 26, 1999, and yet another on June 4, 1999. The second memorandum was filed in concert with his Memorandum in Support of his Motion for Partial Summary Judgment and Memorandum in Opposition to Defendant's Motion for Summary Judgment.

On May 17, 1999, Capital One filed a Motion for Summary Judgment, and on June 4, 1999, Mr. Russell filed a Motion in Opposition. This issue was fully briefed.

On June 14, 1999, Capital One filed a Motion to Strike Certain of Mr. Russell's Exhibits, and on June 21, 1999, Mr. Russell filed a Memorandum in Opposition to this Motion. This issue was fully briefed.

On June 30, 1999, the Court issued its Memorandum of Opinion and Order, granting Capital One's Motions for Summary Judgment and Motion to Strike, and denying Mr.

Russell's Motions for Partial Summary Judgment, Motion for Leave to File an Amended Complaint, and Motion for a Mandatory Preliminary Injunction. The District Court also denied Mr. Russell's Motion for Leave to File an Amended Complaint. The Court held that the amended complaint could not withstand a motion for summary judgment, and would therefore be futile.

On July 12, 1999, Mr. Russell filed a Motion for Relief from Judgment, which was denied in July 1999.

On July 26, 1999, Mr. Russell filed a Notice of Appeal to the Sixth Circuit Court of Appeals.

On June 19, 2000, the Sixth Circuit Court of Appeals affirmed the District Court's decision in an unpublished opinion. *Herbert P. Russell v. Capital One Bank*, Case No. 99-3951, United States Court of Appeals for the Sixth Circuit, reported at 2000 WL 875697 (June 19, 2000) (unpublished decision) (Petitioner's Appendix A).

REASONS FOR DENYING THE WRIT

This writ should be denied for five reasons. First, the reasoning and judgment of the District Court and the Sixth Circuit Court of Appeals are sound and correct. Second, the unpublished decision issued by the Sixth Circuit Court of Appeals does not conflict with the decision of another United States Court of Appeals on the same matter. Third, the lower court's disposition of this *pro se* matter, after giving deference to the plaintiff's *pro se* status, was entirely appropriate, satisfied all requirements of the Due Process Clause of the Fifth Amendment of the United States Constitution, and does not call for an exercise of this Court's supervisory power. Fourth, neither the District Court nor the Sixth Circuit Court of Appeals were presented with Mr. Russell's allegation of due process violations raised in this petition, and therefore those courts did not rule upon the

issues. Finally, the petition should not be granted to reevaluate the findings by the lower courts with respect to Petitioner's federal and state claims.

I. FEDERAL AND STATE LAW WERE PROPERLY APPLIED IN DISMISSING THE PETITIONER'S MERITLESS CLAIMS.

Mr. Russell alleges the District Court abused its discretion in failing to grant his motion under Fed. R. Civ. P. 60 to reverse its decision to award summary judgment for the defendant on its counterclaim. There are no grounds for this assertion. Mr. Russell's complaint alleged six claims, none of which has any merit. The District Court and the Sixth Circuit decisions were firmly grounded on basic principles of state law, an appropriate understanding and application of the federal statutes implicated, and an accurate statement of the facts. Mr. Russell entered into a Customer Agreement for a credit card account and incurred a debt of $15,443.54 on that account, exclusive of other costs and charges. Because Mr. Russell breached his Customer Agreement with Capital One, Capital One was entitled to judgment as a matter of law on the $15,443.54 in debt.

Mr. Russell briefed only his breach of contract claim on appeal to the Sixth Circuit, and therefore that is the only claim he preserved for appeal. However, he does not even brief this claim in his petition.

Mr. Russell alleges that Capital One's decision to change the minimum monthly payment from 2% to 3% of the balance in December 1997 was a breach of the terms of his agreement with Capital One. The essential elements of a breach of contract are (i) the legal obligation of a defendant to a plaintiff; (ii) a violation or breach of that right or duty; and (iii) a consequential injury or damage to the plaintiff. *Brown v. Harms*, 467 S.E.2d 805, 807 (Va. 1996).

Applying Virginia state law as the Customer Agreement specified, the District Court properly found (and the Sixth Circuit affirmed) that the Customer Agreement between Mr. Russell and Capital One governed the obligations of the parties, and that Mr. Russell was in breach of that agreement. The District Court stated:

> The Customer Agreement provides that as long as it gives sufficient notice, it could amend or change any part of the agreement, including periodic rates and other charges. The [Petitioner] was given notice in October 1997 that the minimum monthly payments would be increased to 3% of the outstanding balance. . . . The [Petitioner] has continued making minimum monthly payments at the 2% rate instead of the mandatory 3% rate. The Customer Agreement requires the [Petitioner] to pay at least the minimum amount shown on the statement. Consequently, the [Petitioner] is in breach of his contract with Capital One Bank.

See Petitioner's Appendix B at B13.

The Sixth Circuit Court of Appeals affirmed the District Court's decision, stating:

> Because the customer agreement between Russell and Capital One governed the obligations of the parties, . . . Russell was plainly in default. The district court did not err in granting summary judgment for Capital One.

See Petitioner's Appendix A at A3.

Clearly, the District Court based its opinion on a careful reading of the agreement that both parties entered into voluntarily, and it correctly applied basic principles of contract law.

II. THE PETITIONER DID NOT RAISE A DUE PROCESS CLAIM IN THE COURTS BELOW AND WAS NOT DENIED HIS DUE PROCESS RIGHTS.

In his petition to this Court, Mr. Russell alleges for the first time that his due process rights were violated because he did not ask for and was not provided a court-appointed attorney to pursue his claims against Capital One. Since Mr. Russell never asserted a due process violation in the District Court case or in his appeal to the Sixth Circuit Court of Appeals, neither the District Court nor the Court of Appeals addressed the issue. *See* Petitioner's Appendix A and Appendix B. Mr. Russell never requested the District Court for a continuance to find counsel, nor did he ask the Court to appoint an attorney for him at any time during the course of the proceedings. For these reasons, this Court should not consider the issue of due process violations. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) (citations omitted)).

However, even if Mr. Russell had preserved the issue for appeal, his claims of due process violations are meritless. Mr. Russell claims that he should have been appointed an attorney, and yet at the same time he recognizes in his petition that he does not have a due process right to counsel in a civil case (citing *Lassiter v. Department of Social Servs.*, 452 U.S. 18, (1981)) (see Petitioner's petition at 5, 6).

The Court in *Lassiter* held that the failure to appoint counsel for indigent parents in a proceeding for termination of parental status did not deprive them of due process, stating that "[w]here the individual's liberty interest is of diminished or less fundamental stature, or where the prescribed procedure involves informal decisionmaking without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process." *Lassiter*, 452 U.S. at 37.

It laid out three elements a court must evaluate in making such a determination: (i) the private interests at stake; (ii) the government's interest; and (iii) the risk that the procedures used will lead to erroneous decision. *See id.*

In *Lavado v. Keohane*, 992 F.2d 601 (6th Cir. 1993), the Sixth Circuit Court of Appeals similarly held that the appointment of counsel in a civil case is not a constitutional right, but rather a privilege that is justified only in exceptional circumstances, such as when the case involves complex legal issues. *See Lavado*, 992 F.2d at 605-06.

Mr. Russell is not indigent and did not file this action *in forma pauperis*. Moreover, he is in no danger of losing his personal freedom or physical liberty, and the counterclaim filed against him does not contain allegations upon which criminal charges could be based. Mr. Russell's private interest in this litigation is exclusively pecuniary. Further, there were no procedural errors or irregularities in the litigation of this case, as the record reflects. There are no complex legal issues involved, and he cites no exceptional circumstances that would warrant the court appointment of counsel. All of Mr. Russell's claims essentially boil down to the simple issue of whether he could avoid his contractual obligations to pay a valid credit card debt by arguing that the issuer of the credit card could not rely upon the terms of the agreement.

Mr. Russell also cites *Gideon v. Wainwright*, 372 U. S. 335 (1963), to support his contention that he should have a due process right to counsel. As this Court is well aware, *Gideon v. Wainwright* does not apply to civil litigants. Mr. Russell has no due process right to a court-appointed attorney in this matter.

Additionally, Mr. Russell suggests that because he was not represented by counsel, he should not be obligated to follow the Federal Rules of Civil Procedure. The Court in *Haines v.*

Kerner, 404 U.S. 519 (1972), held that courts must liberally construe the pleadings of *pro se* litigants. The District Court recognized this well-established precedent, and the record reflects that it gave a full and fair reading to all of Mr. Russell's voluminous pleadings and motions. *Haines* does not stand for the proposition, however, that *pro se* litigants are not bound by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Even a *pro se* litigant is subject to Rule 56 of the Federal Rules of Civil Procedure. The District Court appropriately granted Capital One's Motion for Summary Judgment.

CONCLUSION

This is yet another case where the federal courts have gone to extraordinary lengths to give a *pro se* plaintiff, who thoroughly misunderstands the law and has an unrealistic view of the facts, his day in court. In his Reply Brief to the Sixth Circuit, Mr. Russell acknowledged "The clerk of courts [sic] office was very patient and courteous" with respect to Mr. Russell's filings, and he expressed his appreciation more than once. Mr. Russell had ample opportunity to present to the District Court any evidence to support a valid claim, and he failed to do so. After careful review of the facts and the law, the District Court properly dismissed Mr. Russell's meritless claims pursuant to Fed. R. Civ. P. 56 and granted summary judgment for Capital One. That judgment was affirmed by the Sixth Circuit Court of Appeals based upon well-established law. There are no novel, significant or proper issues to warrant this Court's granting the petition for writ of certiorari. Mr. Russell's petition for writ of certiorari should be denied.

Respectfully submitted,

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